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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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John Grant Lyman,  
*Plaintiffs in Error,*  
*vs.*  
United States of America,  
*Defendant in Error.*

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BRIEF OF PLAINTIFF IN ERROR.

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**BRIEF OF PLAINTIFF IN ERROR.**

This case comes here on a writ of error to the United States District Court for the Southern District of California, Southern Division, granted February 6, 1914 [Tr. fol. 2], to review a judgment of said court dated February 9, 1914 [Tr. fol. 193], sentencing plaintiff in error (hereafter called defendant) to imprisonment for eighteen months in the state prison at San Quentin, California, after a verdict finding him guilty of using the United States post-office establishment in furtherance of a scheme to defraud divers persons [Tr. fol. 189], on an indictment which is divided into six counts, which charge the defendant with using the postoffice establishment of the United States in the execution of a scheme to defraud divers persons out of their property and

money. The defendant was found guilty on the first count of said indictment and not guilty on the remaining five counts of said indictment [Tr. fol. 189].

The first count of said indictment charges that on or about May 1, 1911, the defendant had devised and had intended to devise a scheme and artifice to defraud divers persons out of their money and property in and by inducing them, by false and fraudulent representations, to pay and transfer to the Panama Development Co., a corporation, said corporation being under the full and complete control, charge and management of the defendant, in the belief that they, said persons, were paying and transferring their money and property to said corporation as agent for the Panamanian government in the purchase of Panama government lands through said corporation, as such agent; defendant well knowing and intending that they, said persons, were not and would not purchase through said corporation as such agent, and that said corporation was not and would not be such agent; and that said defendant intended to secure and convert a large part of said money and property so obtained to his own use, or to the use of said corporation.

The indictment further charges that in furtherance of said scheme defendant falsely and fraudulently represented and pretended to said persons as follows:

That said defendant would organize and incorporate said corporation and would represent, announce, publish and advertise to all of said persons intended to be defrauded, in the name of said corporation, that

said corporation had a paid up capital stock of \$50,000.00; that some of the officers and directors were prominent in, connected with and employed by the government of Panama, and that other officers and directors were prominent elsewhere; that said corporation was agent for the Panamanian government for the sale of said land; that said government offered for sale said lands through said company as agent; that said lands consisted of agricultural, timber and mineral lands situated in the districts of Colce, Veragua and Chiriqui, in said republic of Panama; that said land could be purchased through said company as agent at prices from \$3.00 to \$5.00 per acre, payable one-half down to said agent, and the balance to said agent within four years; that upon such application to said agent and the making of said payment, said corporation would file application for land through its corporation representative in Panama, and the Panamanian government would make allotments of lands and issue provisional title direct to applicant, and thereafter, upon the payment of balance of price to the corporation and cultivation of four-fifths of said land, the government would issue full title; that said corporation had experts in Panama familiar with the lands, who would select the best land for the applicants; that the corporation could and would furnish maps showing agency lands and could and would designate offered lands thereon; that the corporation had sold an American colony 10,000 acres in Agua Dulce; that the corporation, as agent for said Panamanian government, offered said government lands for sale;

that a railroad was being constructed from the city of Panama to the city of David; that the said corporation was clearing and cultivating some government land theretofore sold through corporation as agent of said government; that said corporation had and offered for sale 16,000 acres of government land in Veragua; that on August 6, 1911, said government would advance the price to \$6.00 per acre; that at any time within two years dissatisfied purchasers could have their money back.

That the defendant did on the 28th day of August, 1911, for the purpose of executing said scheme and artifice to defraud, knowingly, unlawfully and wilfully cause to be placed in the postoffice of the United States, in the city of Los Angeles, state of California, within the Southern District of California, a certain sealed envelope containing a certain letter [Tr. fol. 14] to be sent and delivered by said postoffice to Mr. Frederick L. Anderson, Soldiers' Home, California, Ward 9.

The second, third, fourth, fifth and sixth counts of the indictment are in substantially the same language as the first count, except that they charge the mailing of letters addressed to the persons named in each of said counts. [Second count, Tr. fols. 15-24; third count, Tr. fols. 24-28; fourth count, Tr. fols. 28-32; fifth count, Tr. fols. 33-37; sixth count, Tr. fols. 37-40.]

The trial commenced on October 16th, 1913, before Judge Olin Wellborn and a jury. On December 10th, 1913, the jury returned a verdict finding the defendant



guilty under the first count of the indictment, and not guilty under each of the remaining five counts of the indictment [Tr. fol. 189.]

The defendant made a motion for a new trial [Tr. fol. 190], which was denied, and defendant excepted [Tr. fol. 194]. Thereupon defendant made a motion in arrest of judgment [Tr. fol. 192], which was denied [Tr. fol. 194].

The defendant was sentenced to eighteen months' imprisonment in the state prison at San Quentin, California [Tr. fol. 194].

The questions involved in this writ of error are the admission, over defendant's objection, of letters, books and papers which had been unlawfully seized from the possession of defendant by the government, without warrant or authority of law, and defendant was seized and taken into custody; a warrant of arrest was not served on defendant until after he had been arrested and placed in jail after a seizure of his papers. There is no dispute as to the unlawful seizure of defendant's papers; the testimony of the government's witnesses shows that defendant's papers were taken without any warrant or authority of law.

The defendant objected to the introduction in evidence of defendant's papers unlawfully seized by the government, and exceptions were duly taken and allowed.

The defendant contends that this evidence was incompetent because it was obtained by the government in violation of his constitutional rights under the fourth and fifth amendments to the federal Constitution.

2.

THE INSTRUCTION GIVEN BY THE COURT AS SET OUT  
IN THE 148TH ASSIGNMENT OF ERROR.

[Tr. fol. 1301.]

The first assignment of error [Tr. fols. 1076-1077] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Stoddard Incorporating Company of Phoenix, Arizona, and signed "J. G. Lyman," requesting said company to incorporate the Panama Development Company, authorized capitalization \$1,000,000.00, par value shares \$10.00. The letter also contains a request to change the name of the Wyoming Oil and Development Company to that of "Wyoming Oil and Refining Company," and for the deeding of certain property from the old to the new oil company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1077].

The second assignment of error [Tr. fols. 1077-1080] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the defendant at Los Angeles, California. Said letter being in answer to the letter referred to in defendant's first assignment of error. The contents of this letter acknowledge receipt of \$50.00 and inform the defendant that it can be of no advantage to elect a board of three temporary dummy directors for his proposed corporation. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fols. 1078-1080].



The third assignment of error [Tr. fol. 1080] is based on the action of the court in receiving in evidence, over defendant's objection, a letter sent by defendant to the Stoddard Incorporating Company, authorizing said company to proceed with the incorporation of the Panama Development Company, and giving them the names of two persons to be used as directors. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1080].

The fourth assignment of error [Tr. fol. 1081] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Stoddard Incorporating Trust Company for the purpose of ascertaining what steps would be necessary to reduce the capital stock of the Panama Development Company from one million dollars to one hundred thousand dollars. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1081].

The fifth assignment of error [Tr. fol. 1082] was based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Panama Development Company, advising said company of the necessary steps to be taken to legally change the articles of incorporation of an Arizona company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1083].

The sixth assignment of error [Tr. fols. 1083-1085] is based on the action of the court in receiving in evi-

dence, over defendant's objection, a letter addressed to E. A. Lynn, Los Angeles, California, signed by one Santiago de Guardia, in which the writer requests said E. A. Lynn to remove his name from the advisory board of the Panama Development Company, because of the misrepresentations as to the status of the Panama Development Company, and the status of the writer with the Panama Development Company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1085].

The seventh assignment of error [Tr. fol. 1086] is based on the action of the court in permitting the witness John Redpath to testify who authorized him to sign an itemized statement showing the resources and liabilities of the Panama Development Company. Defendant objected to the introduction of this testimony and excepted to the action of the court in receiving it [Tr. fol. 1086].

The eighth assignment of error [Tr. fol. 1086] is based on the action of the court in receiving, over defendant's objection, a statement showing the resources and liabilities of the Panama Development Company, May 26th, 1911. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1087].

The ninth assignment of error [Tr. fol. 1088] is based on the action of the court in receiving in evidence, over defendant's objection, a stock book of the Panama Development Company, showing the list of stockholders of said company. The defendant ob-

jected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1089].

The tenth assignment of error [Tr. fols. 1090-1091] is based on the action of the court in receiving in evidence, over the defendant's objection, an itemized statement of the resources and liabilities of the Panama Development Company May 26th, 1911. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1091].

The eleventh assignment of error [Tr. fols. 1091-1102] is based on the action of the court in receiving in evidence, over defendant's objection, the minutes of May 16th, 1911, of the meeting of the board of directors of the Panama Development Company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1102].

The twelfth assignment of error [Tr. fol. 1102] is based on the action of the court in receiving in evidence, over defendant's objection, a demand note in favor of the defendant for \$23,000, signed by the Panama Development Company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1103].

The thirteenth assignment of error [Tr. fols. 1103-1107] is based on the action of the court in receiving in evidence, over the defendant's objection, a letter addressed to the Los Angeles Stock Exchange, ex-

plaining the nature of the business of the Panama Development Company, and giving a list of the different persons of official capacity in said company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1107].

The fourteenth assignment of error [Tr. fols. 1107-1108] is based on the action of the court in permitting the introduction of testimony attempting to show the defendant's connection with the Tropical Products Company. The defendant objected to the introduction of this testimony and excepted to the action of the court in receiving it [Tr. fol. 1108].

The fifteenth assignment of error [Tr. fols. 1109-1110] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Stoddard Incorporating Trust Company, containing instructions for the incorporation of a company entitled "Panama Sugar Estates Limited." The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1111].

The sixteenth assignment of error [Tr. fol. 1111] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Stoddard Incorporating Company containing instructions concerning an amendment of the articles of incorporation of the Panama Development Company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1112].

The seventeenth assignment of error [Tr. fols. 1112-1117] is based on the action of the court in receiving in evidence, over defendant's objection, a statement in the nature of a prospectus for the Panama Sugar Estates Limited, showing different officers of the company and the nature and purposes of such company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1117].

The eighteenth assignment of error [Tr. fols. 1117-1119] is based on the action of the court in receiving in evidence, over the objection of the defendant, a grant deed to certain real property situated in the county of Los Angeles, California. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1120].

The nineteenth assignment of error [Tr. fols. 1120-1122] is based on the action of the court in receiving in evidence, over defendant's objection, a contract between the Panama Development Company and Elizabeth Leach of Los Angeles, for the sale of 1,000 acres of Panamanian government lands. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1122].

The twentieth assignment of error [Tr. fols. 1123-1124] is based on the action of the court in receiving in evidence, over defendant's objection, a contract between the Panama Development Company and Elizabeth Leach for the clearing of 1,000 acres of sugar



land. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1124].

The twenty-first assignment of error [Tr. fols. 1124-1132] is based on the action of the court in receiving in evidence, over defendant's objection, a mortgage by the Panama Development Company in favor of Sadie Waldon, mortgaging certain real property to said Sadie Waldon, as security for a loan of \$1100.00. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1132].

The twenty-second assignment of error [Tr. fols. 1132-1134] is based on the action of the court in receiving in evidence, over defendant's objection, an agreement by the Panama Development Company to sell 2,000 acres of Panamanian government land to Frances B. Haldeman, Riverside, California. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1135].

The twenty-third assignment of error [Tr. fols. 1135-1136] is based on the action of the court in receiving in evidence an agreement between the Panama Development Company and Frances B. Haldeman for the clearance of 1,000 acres of sugar land. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1136].

The twenty-fourth assignment of error [Tr. fols. 1137-1139] is based on the action of the court in re-



ceiving in evidence, over defendant's objection, a grant deed by Frances B. Haldeman and Robert J. Haldeman, to the Panama Development Company, of certain property in the county of Riverside, California. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1139].

The twenty-fifth assignment of error [Tr. fols. 1139-1141] is based on the action of the court in receiving in evidence, over defendant's objection, an agreement between the Panama Development Company and E. D. Ryan, employing E. D. Ryan as general manager of said company in the republic of Panama. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it.

The twenty-sixth assignment of error [Tr. fols. 1141-1142] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram by the defendant to the Panama Development Company, with instructions to address all mail to San Francisco. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1142].

The twenty-seventh assignment of error [Tr. fol. 1142] is based on the action of the court in receiving in evidence, over the objection of the defendant, a letter addressed to Mr. Redpath containing general instructions concerning the business of the company. Defendant objected to the introduction of this evidence

and excepted to the action of the court in receiving it [Tr. fol. 1143].

The twenty-eighth assignment of error [Tr. fol. 1143] is based on the action of the court in receiving in evidence, over the defendant's objection, a letter addressed to Mr. Redpath discussing the bills and general business of the company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1146].

The twenty-ninth assignment of error [Tr. fol. 1146] is based on the action of the court in receiving in evidence, over defendant's objection, an unaddressed telegram concerning financial difficulties with one Amiel. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1146].

The thirtieth assignment of error [Tr. fol. 1147] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned telegram addressed to Panamano, Los Angeles, stating that arrest would follow unless certain matters were attended to immediately. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1147].

The thirty-first assignment of error [Tr. fol. 1147] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to the defendant, signed "R," demanding that defendant return immediately to Los Angeles. Defendant objected to the introduction of this evidence

and excepted to the action of the court in receiving it [Tr. fol. 1148].

The thirty-second assignment of error [Tr. fol. 1148] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to John Redpath, signed "L," informing Redpath that everything possible was being done to raise necessary funds. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1149].

The thirty-third assignment of error is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned telegram addressed "Panamano," referring to a certain action by one Amiel unless matters settled in full. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1150].

The thirty-fourth assignment of error is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed "Panamano," signed "Amiel," threatening immediate action unless settlement made. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1150].

The thirty-fifth assignment of error [Tr. fol. 1151] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one Redpath, discussing the contents of a cable from one Smith, together with instructions to Redpath to reduce the price of the company's lands

and see if he cannot make some quick sales to promising prospects. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1152].

The thirty-sixth assignment of error [Tr. fols. 1153-1155] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one Redpath informing the said Redpath that the writer was unable to raise any money and instructing the said Redpath as to what steps to take in the event creditors of the company became too insistent. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1155].

The thirty-seventh assignment of error [Tr. fol. 1155] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to John Redpath, signed "L," informing said Redpath that arrangements had been made to secure \$5,000 and that Redpath could draw on "L" for \$2,000. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1156].

The thirty-eighth assignment of error [Tr. fol. 1156] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to J. G. Lyman, signed "Redpath," concerning resignation of one Smith, and the receipt of a letter and wire from one Guardia. Defendant objected to the introduction of this evidence and ex-

cepted to the action of the court in receiving it [Tr. fol. 1157].

The thirty-ninth assignment of error [Tr. fol. 1157] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned telegram addressed to J. G. Lyman, requesting that he appear at once at conference concerning demands on contracts. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1157].

The fortieth assignment of error [Tr. fol. 1158] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to Redpath, signed "L," requesting the presence of Redpath and Lynn, together with contracts and notes of corporation, for the purpose of raising money. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1158].

The forty-first assignment of error [Tr. fol. 1159] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to J. G. Lyman, signed Redpath, informing Lyman that Lynn and Redpath were leaving tonight and to arrange meeting by wire. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1159].

The forty-second assignment of error [Tr. fol. 1159] is based on the action of the court in receiving in evidence, over the defendant's objection, a telegram addressed to Redpath, signed "L," arranging for meet-



ing at St. Francis Hotel at 9:30 in the morning. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1160].

The forty-third assignment of error [Tr. fol. 1160] is based on the action of the court in receiving in evidence, over the defendant's objection, an unsigned telegram addressed to Panamano, Los Angeles, containing information that one Amiel will not accept draft and that the writer is unable to get away without help. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1161].

The forty-fourth assignment of error [Tr. fol. 1161] is based on the action of the court in receiving in evidence, over defendant's objection, a cable message addressed "Lyman," signed "Smith," containing two words, "Must answer." Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1161].

The forty-fifth assignment of error [Tr. fols. 1162-1169] is based on the action of the court in receiving in evidence, over defendant's objection, three checks on the National Bank of California, in favor of the Howard Automobile Company, for \$1,000, \$250.00, and \$144.90, respectively, signed by John Redpath, vice-president, L. R. Smith, secretary, together with one check in favor of the First National Bank, \$200.00, signed John Redpath, vice-president; one check in favor of John G. Lyman, \$1,000, signed John Redpath, vice-president, L. R. Smith, secretary; one



check in favor cash, \$100.00, signed John Redpath, vice-president, E. A. Lynn, assistant secretary, and endorsed J. G. Lyman; eight checks in favor of John G. Lyman for \$500.00, \$1,000.00, \$100.00, \$500.00, \$274.00, \$227.90, \$227.90 and \$300.00, respectively, and signed by John Redpath, vice-president, L. R. Smith, secretary, and three of the checks being signed by E. A. Lynn, assistant secretary; one check for \$1,000 in favor of "Ourselves," signed by L. R. Smith, secretary, and endorsed Panama Development Company by John Redpath, vice-president. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1169].

The forty-sixth assignment of error [Tr. fol. 1170] is based on the action of the court in receiving in evidence, over defendant's objection, a prospectus of the Panama Sugar Estates Limited, setting forth the price at which shares of the company's stock might be purchased. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1171].

The forty-seventh assignment of error [Tr. fols. 1172-1174] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Paul A. Hauser and signed Panama Development Company, by L. R. Smith, commenting upon the profits to be made by said Hauser if he would take advantage of the opportunity to purchase Panamanian government lands as offered by the Panama Development Company. Defendant ob-

jected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1174].

The forty-eighth assignment of error [Tr. fols. 1174-1177] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to Mrs. Dr. Steele, requesting of said Mrs. Dr. Steele that she inform the writer who it was that told her the Panama Development Company was the greatest graft of the century. The letter informed the said Steele that her informant had misled her and that the Panama Development Company had \$50,000.00 paid up cash, and was entirely responsible, and the lands offered for sale were in every way desirable. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1177].

The forty-ninth assignment of error [Tr. fols. 1177-1179] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one Hellwig concerning hotel prices at David, climate at Chirique, cost of clearing and planting 20 acres of land, and the best means of going to Panama. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1179].

The fiftieth assignment of error [Tr. fols. 1179-1182] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Mrs. O. Hellwig, signed Panama Development Company, by L. R. Smith, discussing with said

Hellwig conditions of the climate of the Canal Zone and in the province of Chirique, the markets in Panama, and railroads and fertility of soil, and the anticipated raise in price of land. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1182].

The fifty-first assignment of error [Tr. fol. 1182] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to John Redpath, informing the said Redpath that one Mrs. J. M. Chowlwell has a new bungalow which she will exchange for Panama government lands, and the terms and conditions under which she would make the exchange. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1182].

The fifty-second assignment of error [Tr. fol. 1184] is based on the action of the court in receiving in evidence, over defendant's objection, a letter signed Thomas O'Rourke, containing the information that the writer is unable to make a payment due on his purchase of land and would like to transfer his interests in some land and corporate stock for some Panama lands. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1185].

The fifty-third assignment of error [Tr. fol. 1185] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one N. R. Bell, expressing the writer's disappointment in the contents of a letter of the 2nd

inst. and informing the said Bell to immediately make some arrangements for the disposal of the property referred to. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1186].

The fifty-fourth assignment of error [Tr. fol. 1186] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to Jacob Van de Grift, informing the said Grift of the conditions under which the writer would sell the Haldeman property if the sale could be made this week. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1187].

The fifty-seventh assignment of error [Tr. fol. 1193] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to F. L. Anderson, signed by E. A. Lynn, promising to reserve 20 acres in block 29 for one Funiman. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1194].

The fifty-ninth assignment of error [Tr. fols. 1195-1201] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter on letter head of the Panama Development Company, containing the statement as to the prices at which Panama government lands could be purchased, and the general adaptability and fertility of Panama lands, together with a statement of the future worth of said lands and a general statement of conditions to



be met at that time in acquiring said lands. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1201].

The sixty-first assignment of error [Tr. fols. 1205-1207] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Panama Development Company and signed N. Campbell, acknowledging the receipt of an offer for exclusive agency for the sale of land in the province of Cocle, together with the information that the writer had friends who would purchase many thousand acres of these lands; also a request for information concerning the nature of the organization of the Panama Development Company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1207].

The sixty-second assignment of error [Tr. fol. 1210] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one N. Campbell, containing an answer to a letter of August 29th from Campbell, informing the said Campbell that the company is an Arizona corporation with \$100,000 capitalization, \$50,000 cash paid in; also a statement that a three page circular letter was enclosed giving details of conditions of the company and the lands it had for sale. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fols. 1210-1211].

The sixty-third assignment of error [Tr. fols. 1210-

1211] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to Messrs. French and Company, informing said French & Company that in accordance with conversation had with them, 10,000 acres of sugar land, situated in Cocle province, had been set aside 30 days for them to sell. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1211].

The sixty-fourth assignment of error [Tr. fols. 1211-1213] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to R. Spotford French, acknowledging receipt of a letter concerning business arrangements made and informing the said French regarding the price of government land, and the transportation facilities in Panama. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1213].

The sixty-fifth assignment of error [Tr. fols. 1213-1215] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Mr. Lyman, signed "R. Spotford French," commenting upon the fact that the writer would like to have some references to show customers, and that he could receive no definite information anywhere as to the financial status of the company, the writer suggesting that if he be permitted to handle details as he saw fit that he could get the business. Defendant objected to the introduction of this evidence and excepted



to the action of the court in receiving it [Tr. fol. 1215].

The sixty-sixth assignment of error [Tr. fols. 1215-1216] is based on the action of the court in receiving in evidence an unsigned letter addressed to R. Spotford French, informing the said French that his suggestions concerning the way to handle sales are impractical. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1216].

The sixty-seventh assignment of error [Tr. fol. 1217] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed "Panama Development Company," signed "R. Spotford French," asking the company to reserve 4,000 acres for 30 days, as the writer had interested parties almost sure to take 5,000 acres and pay one-half down. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1217].

The sixty-eighth assignment of error [Tr. fol. 1218] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to R. Spotford French, informing said French that land had been reserved according to his request. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1218].

The sixty-ninth assignment of error [Tr. fol. 1219] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed

to the Panama Development Company, signed "R. Spotford French," requesting the company to reserve a block on the railroad until August 1st. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1219].

The seventieth assignment of error [Tr. fol. 1219] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to R. Spotford French, informing said French that block 51 had been reserved for him. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1220].

The seventy-first assignment of error [Tr. fol. 1220] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Panama Development Company, and signed R. Spotford French, informing the company that in running ads making comparisons concerning the price of land in Panama it would be better to comment upon the climate. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1221].

The seventy-second assignment of error [Tr. fol. 1221] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Panama Development Company, signed "R. Spotford French," discussing with the company as to the best method of advertising lands. Defendant objected to the introduction of this evidence and excepted

to the action of the court in receiving it [Tr. fol. 1222].

The seventy-third assignment of error [Tr. fol. 1223] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to R. Spotford French, informing said French that inasmuch as he didn't like the way the company advertised he could do the advertising himself and they would allow him a commission of 30%. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1223].

The seventy-fourth assignment of error [Tr. fol. 1224] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to John G. Lyman, signed "R. Spotford French," asking said Lyman what guarantee he could give syndicate that lands would be planted and to what. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1224].

The seventy-fifth assignment of error [Tr. fol. 1225] is based on the action of the court in receiving in evidence, over defendant's objection, unsigned letter addressed to R. Spotford French, informing said French of the cost of clearing and planting lands to sugar and how much money would be necessary to put up if syndicate wanted to make arrangements for planting. Defendant objected to introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1226].

The seventy-sixth assignment of error [Tr. fols. 1226-1228] is based on the action of the court in permitting the introduction of the testimony of the witness G. E. Wagner as to what one Redpath told him concerning sale of land to an American colony; that they were exclusive agents Panama government; railroad would be completed in about six week; what kind of crops were grown, and a conversation had with said Redpath concerning transfer of a 9-room house at Lawndale in exchange for land. Defendant objected to the introduction of this testimony and excepted to the action of the court in receiving it [Tr. fol. 1228].

The seventy-seventh assignment of error [Tr. fol. 1229] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to J. E. Wagner, signed Panama Development Company, by G. L. Maynard, requesting the said Wagner to appear at the office of the company, as they had a proposition to make to him concerning the exchange of his property. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1230].

The seventy-ninth assignment of error [Tr. fol. 1232] is based on the action of the court in receiving in evidence, over defendant's objection, a contract with William Randolph Hearst, to insert advertising matter in the Los Angeles Examiner, signed "L. R. Smith. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1233].

The eightieth assignment of error [Tr. fols. 1233-1235] is based on the action of the court in receiving in evidence, over defendant's objection, advertising matter addressed to investors, signed "Panama Development Company." Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1235].

The eighty-first assignment of error [Tr. fol. 1235] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Thomas O'Rourke, signed "Panama Development Company, L. R. Smith, secretary," advising said O'Rourke that the company would accept payments for the land in two installments of \$12.50 each; also informing said O'Rourke that the company had some very fine land in the province of Chirique which was selling rapidly and urged the said O'Rourke to make his application for land at once. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1237].

The eighty-second assignment of error [Tr. fol. 1237] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Thomas O'Rourke, signed "Panama Development Company, L. R. Smith," informing said O'Rourke that an application blank was enclosed per request. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1237].

The eighty-third assignment of error [Tr. fol. 1238] is based on the action of the court in receiving in evi-



dence, over defendant's objection, evidence consisting of Panama Development Company form of application for land. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1239].

The eighty-fourth assignment of error [Tr. fol. 1239] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed "Thomas O'Rourke," signed "Panama Development Company, by L. R. Smith," informing the said O'Rourke that maps of the Panama country in general and an application blank was enclosed with request that said O'Rourke fill out same and forward with remittance. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1240].

The eighty-fifth assignment of error [Tr. fol. 1240] is based on the action of the court in receiving in evidence, over defendant's objection, an envelope postmarked "Los Angeles, California," addressed "Thomas O'Rourke, San Fernando, California." Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1240].

The eighty-sixth assignment of error [Tr. fol. 1241] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Thomas O'Rourke, signed "Panama Development Company, L. R. Smith," acknowledging the receipt of money from the said O'Rourke and promising to plant 10 acres for the said O'Rourke, and take the expense



out of the first two crops, promising the said O'Rourke that the land would be planted as soon as provisional title is received from the government; also informing the said O'Rourke that the price of land would be raised the latter part of the month. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1242].

The eighty-seventh assignment of error [Tr. fol. 1243] is based on the action of the court in receiving in evidence, over defendant's objection, an application for land, addressed to Panama Development Company and signed "Thomas O'Rourke," said O'Rourke informing the company that he was sending them \$12.50 with request that the company purchase 10 acres of government land in the republic of Panama for the writer. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1244].

The eighty-eighth assignment of error [Tr. fol. 1244] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed "Thomas O'Rourke," signed "Panama Development Company, by L. R. Smith," acknowledging the receipt of \$15.00 and promising to make a good selection of land for the said O'Rourke. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1245].

The ninetieth assignment of error [Tr. fol. 1248] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed

to Thomas O'Rourk, signed "Panama Development Company, by L. R. Smith," informing said O'Rourk of the mailing to him of a contract covering 60 acres of timber land in Veragua. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it.

The ninety-first assignment of error [Tr. fol. 1249] is based on the action of the court in receiving in evidence, over defendant's objection, a letter signed "Thomas O'Rourk," containing a statement by the writer that signed agreement was returned as requested and asking for information of some physician recently returned from Panama. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1250].

The ninety-second assignment of error [Tr. fol. 1250] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Thomas O'Rourk, signed "Panama Development Company, by L. R. Smith," acknowledging receipt of \$12.50 due on first contract. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1251].

The ninety-third assignment of error [Tr. fol. 1251] is based on the action of the court in receiving in evidence, over defendant's objection, a letter signed "Thomas O'Rourk," the writer discussing the general terms of a letter to him informing him terms under which the writer could purchase Panama land. Defendant objected to the introduction of this evidence

and excepted to the action of the court in receiving it [Tr. fol. 1253].

The ninety-fifth assignment of error [Tr. fol. 1256] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Frederick L. Anderson, signed "Panama Development Company, by L. R. Smith," enclosing a map of Panama, showing where a large tract of land had recently been sold to an American colony, and suggesting to Anderson that as the price of lands would soon advance he had better get in an early application. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1257].

The ninety-sixth assignment of error [Tr. fol. 1257] is based on the action of the court in receiving in evidence, over defendant's objection, a letter to F. L. Anderson, signed "Panama Development Company, by E. A. Lynn," informing said Anderson that 20 acres in block 9 would be reserved for Mr. Funiman. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1258].

The ninety-seventh assignment of error [Tr. fol. 1259] is based on the action of the court in receiving in evidence, over defendant's objection, a blank form of agreement for the purchase of land with a heading "Panama Development Company Land Agreement." Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1263].

The ninety-eighth assignment of error [Tr. fol. 1263] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to Michael Werner, informing the said Werner that requested papers relative to government land in Panama were being sent him per his request. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1264].

The ninety-ninth assignment of error [Tr. fols. 1264-1269] is based on the action of the court in receiving in evidence, over defendant's objection, five letters of different dates, all addressed to Michael Werner, and signed "Panama Development Company, by L. R. Smith." The first letter [Tr. fol. 1265] gives the said Werner information and data concerning Panama lands, with an offer of 10% commission on any business the said Werner might send the company. The second letter [Tr. fol. 1266] acknowledges receipt of two checks for \$25.00 each. The third letter [Tr. fol. 1267] informs the said Werner of the mailing to him of land agreement signed and sealed, covering 10 acres of Panama lands, together with receipt for \$25.00; also information that \$2.50 had been placed to his credit by the company. The fourth letter [Tr. fol. 1268] informs the said Werner that maps showing Panama and Agua Dulce lands were being sent him; also a suggestion that the said Werner send his application at once. The fifth letter [Tr. fol. 1269] informs the said Werner that his application for Panama lands had been duly forwarded to Panama. De-

fendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1269].

Assignment of error No. 100 [Tr. fols. 1269-1270] is based on the action of the court in receiving in evidence, over defendant's objection, an application for land, signed Michael Werner, enclosing \$25.00, with a request that 10 acres of government land in Panama be purchased for the writer. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1270].

Assignment of error No. 101 [Tr. fol. 1270] is based on the action of the court in receiving in evidence, over defendant's objection, a letter signed "Michael Werner," requesting Panama Development Company to return money paid it because of sickness in the family of the writer. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1271].

! Assignment of error No. 102 [Tr. fol. 1271] is based on the action of the court in receiving in evidence, over defendant's objection, 176 land agreements, issued by the Panama Development Company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1272].

Assignment of error No. 103 [Tr. fol. 1272] is based on the action of the court in receiving in evidence, over defendant's objection, 114 applications made to the Panama Development Company for land, and signed by the respective applicants. Defendant



objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1272].

Assignment of error No. 104 [Tr. fol. 1272] is based on the action of the court in receiving in evidence, over defendant's objection, 170 documents entitled "Powers of Attorney," which powers of attorney were numbered, dated and signed by the respective applicants for land, and witnessed by the employees of the Panama Development Company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1273].

Assignment of error No. 107 [Tr. fol. 1274] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Paul A. Hauser, signed "Panama Development Company, L. R. Smith, secretary," offering to exchange Panama land for some Long Beach property owned by said Hauser. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1275].

Assignment of error No. 117 [Tr. fol. 1279] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Panama Development Company, signed "Stefan Hladish," informing the company that the writer would like to have 100 acres of land for raising stock. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1280].

Assignment of error No. 118 [Tr. fol. 1280] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Stefan Hladish, signed Panama Development Company, by L. R. Smith, informing said Hladish as to climate and conditions in Panama, and the best place to get land for raising stock. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1282].

Assignment of error No. 119 [Tr. fol. 1282] is based on the action of the court in permitting the witness Stefan Hladish to answer a question concerning a letter received by said witness through the mail, and the introduction of said letter in evidence. Defendant objected to the introduction of this testimony and evidence and excepted to the action of the court in receiving it [Tr. fol. 1282].

Assignment of error No. 148 [Tr. fol. 1301] is based on the action of the court in instructing the jury as follows:

"Replying to the question which you have propounded to me, I instruct you that the mailing of a letter without the fraudulent intent would be no crime. If, however, the evidence satisfies you beyond a reasonable doubt that the fraudulent intent was in the mind of the defendant before the mailing of any one of the letters mentioned in the indictment, then, as to the count in which the letter is set forth, the fraudulent intent is sufficiently established."

## BRIEF OF ARGUMENT.

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### POINT ONE

The trial court erred in receiving, over defendant's objection, books, records and papers which had been unlawfully taken from defendant's possession by officers of the United States government. The evidence complained of under this point is fully set out in assignments of errors 1 to 6 inclusive [Tr. fols. 1076-83], 8 to 13 inclusive [Tr. fols. 1786-1103], 15 to 40 inclusive [Tr. fols. 1108-1159], 57 [Tr. fol. 1193], 59 to 75 inclusive [Tr. fols. 1195-1225], 77 [Tr. fol. 1229], 79 to 86 inclusive [Tr. fols. 1232-1243], 88 [Tr. fol. 1263], 90 to 93 inclusive [Tr. fols. 1248-1251], 95 to 104 inclusive [Tr. fols. 1256-1272], and 107-117 inclusive [Tr. fols. 1274-1279].

An examination of these assignments of error will disclose the prejudicial character of the evidence herein complained of. It is not disputed by the government that the various papers and documents, referred to in the assignment of errors, were taken from the possession and control of the defendant against his will and without his permission, and without any warrant or authority of law. The introduction in evidence over the objection of the defendant of his private papers and documents obtained without warrant or authority of law is in violation of the spirit and letter of the fourth and fifth amendments to the federal Constitution. The fourth amendment provides as follows:

“The right of the people to be secure in their persons, houses, papers and effects, against un-

reasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”

The fifth amendment provides, in part:

“Nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law,” etc.

In *Boyd v. United States*, 116 U. S. 116, the meaning, purpose and object of these two amendments are set forth with such clearness and force that we beg the indulgence of the court for quoting somewhat liberally from the opinion of Mr. Justice Bradley.

In that case an information was filed by the United States District Attorney in a case of seizure and forfeiture of property against thirty-five cases of plate glass, seized by the collector as forfeited to the United States under the internal revenue law of June 22, 1874. That act provided that any owner, importer, etc., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise by any fraudulent or false invoice, affidavit, letter, or paper, shall be fined not exceeding \$5,000.00 or to imprisonment not exceeding two years, or both. The government charged that said goods had been imported into the United States in violation of law. The plaintiffs in error entered a claim for the goods and pleaded that they had not become forfeited. On the trial it became important to show the quantity

and value of the goods contained in twenty-nine cases previously imported. For this purpose the district attorney offered in evidence an order made by the district judge under section 5 of said act, directing that notice, under the seal of the court, be given to the claimants, requiring them to produce the invoice of the twenty-nine cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice. They objected to its reception in evidence on the ground that in a suit for the forfeiture, no evidence could be compelled from the claimants themselves; and also that the statute, so far as it compels the production of evidence to be used against the claimants, was unconstitutional and void. The evidence was received and the jury found a verdict for the government, condemning the thirty-five cases of glass which were seized, and judgment of forfeiture was given. The judgment was affirmed by the Circuit Court, from which court it was carried to the Supreme Court on writ of error. The order requiring the claimants to produce the invoices desired by the government for the purpose of examination and making copies thereof was based on section 5 of the act of June 22, 1874, which act provided, among other things, that "if the claimants should fail to produce the books, invoices or papers called for in obedience to such notice, the allegations stated in the motion for the order should be taken as confessed, unless the failure to produce should be explained to the satisfaction of the court," and also provided that such book, invoice or paper could be offered



in evidence by the district attorney on behalf of the government. It appears that the act of 1874, under which said notice was issued, was an amendment of certain prior acts of 1863 and 1867, covering the same subject, but which were much more stringent with respect to the search and seizure of books and papers for the use of the government than the act of 1874. The Supreme Court (Mr. Justice Bradley), after quoting the fourth and fifth amendments to the federal Constitution, said:

“But in regard to the fourth amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching amongst his papers, are wanting; and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory

production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure.

"The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an 'unreasonable search and seizure' within the meaning of the fourth amendment to the Constitution? Or is it a legitimate proceeding? It is contended by counsel for the government that it is a legitimate proceeding sanctioned by long usage and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it, in the law or in the historical construction of the law favorable to such usage. \* \* \* But we do not find any long usage, or any contemporary construction of the Constitution which would justify any of the acts of Congress now under consideration. \* \* \* The search for and seizure of stolen or forfeited goods, or goods liable to duties, and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*."

Mr. Justice Bradley then refers to the contemporary history of controversies on the subject of searches and seizures both in this country and in England at and prior to the adoption of the fourth amendment. He quotes with approval the language of Lord Damden in *Entrick v. Carrington*, 19 Howell's State Trials, 1029, as follows:

“Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye by the laws of England cannot be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.’”

The *Boyd* case is affirmed and quoted with approval in the recent case of *United States v. Weeks*, 132 U. S. 383.

#### POINT TWO.

The court erred in giving the instruction to the jury set out in assignment of error 148 [Tr. fol. 1301], as follows:

“Replying to the question which you have propounded to me, I instruct you that the mailing of a letter without the fraudulent intent would be no crime.

If, however, the evidence satisfies you beyond a reasonable doubt that the fraudulent intent was in the mind of the defendant before the mailing of any one of the letters mentioned in the indictment, then, as to the count in which that letter is set forth, the fraudulent intent is sufficiently established."

The error in this instruction plainly appears when a certain question of one of the jurors is taken into consideration, which question brought forth this instruction from the court. The question of the juror referred to is contained in assignment of error 148 [Tr. fol. 1301], as follows:

"Juror Brownstein: We would like to be enlightened in regard to the alleged intent of the defendant to defraud. Are we to consider his intent at the time of organizing the Panama Development Company, or at the time the several letters in the indictment were written and mailed, or any subsequent time?"

In other words, it is apparent from the question asked by the jury they wanted to know if they, the jury, believed the defendant formed the guilty intention to defraud for the first time *after* the organization of the Panama Development Company, could they find the defendant guilty if he subsequently formed a guilty intention at the time the several letters in the indictment were written and mailed, or at any subsequent time? That this instruction, given by the court to the jury in answer to the question of the juror, Brownstein, is not the law is clearly apparent from the following authorities:

In the case of *Durland v. United States*, 161 U. S. 314, the promoters were selling fictitious bonds or security that had no existence, and there was no intention of giving the purchasers anything of value for their money. The Supreme Court said in this case:

“If the testimony had shown that this Provident Company, and the defendant as its president, had entered in good faith upon that business, believing that out of the moneys received they could, by investment or otherwise, make enough to justify the promised return, no conviction could be sustained no matter how visionary might seem the scheme. \* \* \* The charge is that in putting forth this scheme it was not the intention of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed.”

One of the principles established by the *Durland* case, *supra*, is that the bad faith must be found in the antecedent scheme itself, not entered into during the subsequent execution of the scheme.

In the case of a bogus medical institute, the court said:

“While the fraudulent character of the scheme, as executed, is necessarily charged, and must be established by proof, conviction cannot rest on the fact that the scheme is fraudulent in operation for



the statutory offense requires specific intention on the part of the accused to defraud. (*Durland v. United States*, 161 U. S. 313.) In other words, however fraudulent in tendency or fact the scheme may appear to be, neither the scheme nor its execution is punishable under the statute, unless the evidence establishes as well the essential ultimate fact charged as the violation—that it was devised and carried out by the accused with intent to defraud. \* \* \*

*Hibbard v. United States*, 72 Fed. Rep. 66.

It must be remembered that an essential part of the defendant's scheme to defraud as charged in the indictment [Tr. fols. 5-40] consisted of his scheme to organize the Panama Development Co.; that defendant would advertise, etc., to persons intended to be defrauded under name of said corporation; that said corporation had a paid up capital of \$50,000.00; that said corporation was the agent of the Panamanian government for the sale of Panama lands. [Tr. fol. 7.]

The indictment charges that the Panama Development Co. was organized as a corporation on or about May 1, 1911 [Tr. fol. 5] and the government introduced evidence at the trial showing that said corporation came into existence April 29, 1911. [Tr. fol. 212.]

The jury found the defendant guilty on the first count of the indictment. [Tr. fol. 189.] The letter contained in the first count is dated Aug. 28, 1911. [Tr. fol. 14.] The letters set out in the remaining five counts are dated as follows: Second count, Aug.

22, 1911 [Tr. fol. 18]; third count, July 24, 1911 [Tr. fol. 27]; fourth count, June 6, 1911 [Tr. fol. 31]; fifth count, July 11, 1911 [Tr. fol. 36]; sixth count, Aug. 25, 1911 [Tr. fol. 40].

As the jury found the defendant not guilty on the remaining five counts of the indictment it necessarily follows that the jury believed that the defendant had not conceived an intention to defraud until at a time sometime prior to the mailing of the letter set out in the first count and subsequent to the date of letter mailed next prior to the letter in the first count which date was Aug. 25, 1911, the date of the letter contained in the sixth count. [Tr. fol. 40.]

Confronted with these facts it is apparent that the government failed to prove the essential allegations of the indictment.

## II.

The judgment should be reversed and a new trial granted plaintiff-in-error.

Respectfully submitted,

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